NOTE

Presidents Trumping the Courts: Considering Alternatives to the President as Judicial Nominator

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ABSTRACT

Judges are the lifeblood of constitutional order, and their independence is paramount to the rule of law. In light of the politicization of judicial appointments, it is worth asking if the American constitutional design of 1787 continues to safeguard judicial independence. The Framers designed an appointment system that split the appointment procedure between the President and the Senate to maintain judicial independence. The President has the power of nomination, and the Senate has the power to confirm nominees. This Note focuses on the President's power to nominate. Seismic changes to the political system, and to the President's constitutional power, have undermined judicial independence and subjected the judiciary to salient presidential bias. Given both political and legal shifts, the nomination process should be vested in the Speaker of the House, a democratic representative more directly accountable to the people.

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Introduction

Speaking to reporters, President Trump prophesized about the 2020 election: "I think this will end up in the Supreme Court, and I think it's very important that we have nine Justices."[1] This pronouncement came less than two months before the election, and immediately following Justice Ruth Bader Ginsburg's death.[2] The President hur-

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1 David Jackson & Joey Garrison, *Trump Says He Wants to Fill Supreme Court Seat Quickly in Case Justices Need to Settle Election Dispute*, USA Today (Sept. 24, 2020, 5:57 PM) (quoting Donald Trump, President, Statement to Reporters), https://www.usatoday.com/story/news/politics/elections/2020/09/23/trump-need-fill-supreme-court-seat-quickly-because-election/3501368001/ [https://perma.cc/9CX9-P8QL].

2 *See* Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [https://perma.cc/FE2S-EV2Z].

riedly sought a replacement,[3] and the Senate majority leader made clear that any nominee would be confirmed on the President's timetable.[4] After confirming Justice Barrett, Trump lost the election by a clear margin.[5] Faced with defeat, the President bucked democratic norms and filed lawsuits across the nation to overturn the election.[6] As part of this effort, the state of Texas brought suit against key swing states, arguing that those states' internal election laws were unconstitutional.[7] Texas's junior senator, Ted Cruz, volunteered to argue the case before the Court on the President's behalf.[8] President Trump broadcasted the case to his supporters, stating "[w]e will be INTERVENING in the Texas (plus many other states) case. This is the big one. Our Country needs a victory!"[9]

The Supreme Court ultimately rejected the Texas lawsuit,[10] and the courts around the country denied the campaign's other judicial challenges.[11] Nevertheless, the saga demonstrates the powerful role

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3 *See* Jessica Schneider, *Trump Offered Amy Coney Barrett the SCOTUS Job Less than 72 Hours After Ginsburg's Death*, CNN (Sept. 29, 2020, 8:51 PM), https://www.cnn.com/2020/09/29/politics/barrett-trump-questionnaire/index.html [https://perma.cc/YW5M-2BHM].

4 *See* Katie Wadington, *Then and Now: What McConnell, Others Said About Merrick Garland in 2016 vs. After Ginsburg's Death*, USA TODAY (Sept. 19, 2020, 2:41 PM), https://www.usatoday.com/story/news/politics/2020/09/19/what-mcconnell-said-merrick-garland-vs-after-ginsburgs-death/5837543002/ [https://perma.cc/9J3R-XYP3].

5 *See* Jason Lange & Doina Chiacu, *Georgia, Wisconsin Recounts Likely Will Not Change Trump Election Defeat, Officials Say*, REUTERS (Nov. 18, 2020, 12:15 AM), https://www.reuters.com/article/us-usa-election/georgia-wisconsin-recounts-likely-will-not-change-trump-election-defeat-officials-say-idUSKBN27Y0G6 [https://perma.cc/H3QU-6MMS].

6 *See* Anita Kumar & Gabby Orr, *Inside Trump's Pressure Campaign to Overturn the Election*, POLITICO (Dec. 21, 2020, 4:30 AM), https://www.politico.com/news/2020/12/21/trump-pressure-campaign-overturn-election-449486 [https://perma.cc/K8T9-QAFB].

7 Lawrence Hurley, *U.S. Supreme Court Swiftly Ends Trump-Backed Texas Bid to Upend Election Results*, REUTERS (Dec. 11, 2020, 6:40 PM), https://www.reuters.com/article/us-usa-election-trump/u-s-supreme-court-swiftly-ends-trump-backed-texas-bid-to-upend-election-results-idUSKBN28L2YY [https://perma.cc/EL9H-N6FE].

8 Elizabeth Thompson, *Ted Cruz Blasted for Agreeing to Argue Texas Lawsuit to Overturn the Presidential Election*, DALL. MORNING NEWS, (Dec. 10, 2020, 5:10 PM), https://www.dallasnews.com/news/politics/2020/12/10/ted-cruz-blasted-for-agreeing-to-argue-texas-lawsuit-to-overturn-the-presidential-election/ [https://perma.cc/334D-JQKG].

9 Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 9, 2020), https://twitter.com/realDonaldTrump/ [https://perma.cc/P598-TUFY]. This tweet has since been removed. For reference to this tweet, see Brett Samuels, *Trump Says He Will Intervene in Texas Election Lawsuit*, HILL (Dec. 9, 2020, 9:50 AM), https://thehill.com/homenews/administration/529408-trump-says-he-will-intervene-in-texas-election-lawsuit [https://perma.cc/S8X5-CMAC].

10 Texas v. Pennsylvania, 592 U.S. 155 (2020).

11 Jacob Shamsian & Sonam Sheth, *Trump and His Allies Filed More than 40 Lawsuits Challenging the 2020 Election Results. All of Them Failed.*, BUS. INSIDER (Feb. 22, 2021, 5:03 PM), https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11 [https://perma.cc/8MXX-MHRX].

courts play in modern politics. During Justice Barrett's appointment proceedings, for example, many Democrats argued that if they won the election, they should ignore established norms and "pack" the Supreme Court.[12] Then-presidential candidate Joe Biden was dragged into the controversy but remained elusive about his intentions.[13]

It is hard to blame Presidents for exploiting their nomination power. Since *Bush v. Gore*,[14] where the Supreme Court effectively decided the presidential election in a 5–4 decision, the Court has struck down portions of the Voting Rights Act,[15] found action on political gerrymandering to be an unreviewable political question,[16] and decided "an unprecedented wave of election litigation" brought about because of the COVID-19 pandemic.[17] As Trump observed, "[t]he stakes for our country are incredibly high. Rulings that the Supreme Court will issue in the coming years will decide the survival of our Second Amendment, our religious liberty, our public safety and so much more."[18]

This Note argues that the federal appointment system is outdated and focuses on the judicial nomination process. Part I discusses the history of judicial appointments in the United States from the colonial era to the twentieth century. Part II critiques the President's power of nomination, arguing that the power allows the President to trump the Senate's advice and consent role, and exert outsized influence on the judiciary. Finally, Part III argues that the United States should vest the judicial nomination power in the Speaker of the House. Her office combines the same advantages as the President and is simultaneously more representative and democratically accountable.

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12 *See, e.g.*, Paul Waldman, *There's No More Doubt: Democrats Have to Expand the Supreme Court*, WASH. POST (Oct. 27, 2020, 12:56 PM), https://www.washingtonpost.com/opinions/2020/10/27/theres-no-more-doubt-democrats-have-expand-supreme-court/ [https://perma.cc/BT4D-EX3L].

13 *See* Charlie Savage & Katie Glueck, *Biden Punts on Expanding the Supreme Court, Calling for a Panel to Study Changes*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2020/10/22/us/politics/biden-supreme-court-packing.html [https://perma.cc/FM62-8FFJ].

14 531 U.S. 98 (2000).

15 Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

16 Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

17 Lila Hassan & Dan Gluan, *COVID-19 and the Most Litigated Presidential Election in Recent U.S. History: How the Lawsuits Break Down*, PBS (Oct. 28, 2020), https://www.pbs.org/wgbh/frontline/article/covid-19-most-litigated-presidential-election-in-recent-us-history/ [https://perma.cc/KBC6-U5NG].

18 Grace Segers, *Trump Names Amy Coney Barrett as His Supreme Court Nominee*, CBS NEWS (Sept. 26, 2020, 9:24 PM), https://www.cbsnews.com/news/amy-coney-barrett-acceptance-speech-donald-trump-white-house/ [https://perma.cc/Q2TA-6JHZ].

I. History of American Judicial Appointments

This Part addresses the history of judicial appointments to demonstrate how, and why, the constitutional appointment system is intertwined with the separation of powers. Section I.A discusses appointments prior to the enactment of the Constitution and reviews the drafting of the Appointments Clause. Section I.B examines the Constitution's textual commitment to the separation of powers. Finally, Section I.C concludes by discussing the practice of appointments in the first century of the United States. This Part demonstrates that although the Framers broke with tradition to create a new system of separation of powers, that system is still bound by political party dynamics. When political conditions are favorable, the system works as intended. When conditions are poor, the system breaks.

A. Early Judicial Systems and the Constitutional Convention

In contrast to the modern written Constitution, colonial America had no uniform system of laws.[19] Governors acted as judges and dealt with issues on an ad-hoc basis.[20] In the odd cases where judges were appointed, they were removable at-will by the governor.[21] As legislatures formed, and the Crown's interests waned, the colonists took a confrontational and active role in establishing a system based on the rule of law and rooted in a separation of powers.[22] The first attempt at a lasting constitution following the revolution, the Articles of Confederation ("Articles"), limited the judiciary by allowing for only two federal courts.[23] First, Congress alone could "appoint[] courts for the trial of piracies and felonies committed on the high seas . . . provided that no member of congress shall be appointed a judge of any of the said courts."[24] Second, in disputes between two or more states, Congress was the "last resort on appeal," and would "name three persons out of each of the united states" to preside.[25] Congress was the only national

19 *See* Erwin C. Surrency, *The Courts in the American Colonies*, 11 Am. J. Legal Hist. 253, 253 (1967).

20 *Id.* at 257–58, 268.

21 *See id.* at 369.

22 *See* Scott D. Gerber, *The Origins of an Independent Judiciary in North Carolina*, 1663–1787, 87 N.C. L. Rev. 1771, 1771 (2009) (noting that there was "almost continuous conflict between the executive and the assembly over control of the courts, and the political theorizing that suggested a solution to that conflict, directly influenced the nature of the judicial institution").

23 Articles of Confederation of 1781, art. IX, para. 1.

24 *Id.*

25 *Id.* para. 2. The Articles included an extensive procedure for narrowing the size of the

entity responsible for appointments, and its members could serve as judges in disputes between states.[26]

While the United States muddled its way to independence, the Articles failed to provide a strong central government able to mediate disputes.[27] To remedy this inadequacy, wealthy aristocrats called the Constitutional Convention.[28] Most delegates could be classified as "Whigs," who believed in private enterprise and representative government.[29] A smaller but important faction believed that a limited monarchy would be the proper form of administration.[30] Those members of the Convention argued that an "energetic" executive branch would be able to address the nation's problems without being beholden to political faction.[31]

The Virginian delegates circulated their conception of a new constitution, known as the Virginia Plan.[32] It would establish a national legislature with a lower chamber selected by "the people of the several States."[33] This chamber would then select members for the upper chamber,[34] and the national legislature would select a national executive to a single, non-renewable term.[35] There would also be "one or

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Court. It is worth noting that this formal process was only used once. *See* Robert J. Taylor, *Trial at Trenton*, 26 WM. & MARY Q. 521, 521 (1969).

26 *See* ARTICLES OF CONFEDERATION OF 1781, art. IX, paras. 1, 2.

27 *See Vices of the Political System of the United States, April 1787*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-09-02-0187 [https://perma.cc/VAS7-92SV]. For a discussion of the Articles' shortcomings, see generally KEITH L. DOUGHERTY, COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION (2001) (detailing various issues with the weak central government, including an inability to collect taxes and raise a military).

28 CHARLES COLEMAN THATCH JR., THE CREATION OF THE PRESIDENCY 20–21 (1969).

29 *See* ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING 15–16 (2014).

30 *See id.* at 69–70.

31 Hamilton explained this concept as:

> [Energy] is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy. . . . The ingredients, which constitute energy in the executive, are first unity; secondly duration; thirdly an adequate provision for its support, fourthly competent powers.

THE FEDERALIST NO. 70, at 471–72 (Alexander Hamilton) (Jacob Ernest Cooke ed., 1961).

32 The purpose of the plan was originally to gauge the disposition of the various delegates to reform. *See* MARY SARAH BILDER, MADISON'S HAND 43 (2015).

33 THE VIRGINIA PLAN, art. 4, https://www.senate.gov/civics/common/generic/Virginia_Plan_item.htm [https://perma.cc/35GE-53Z4].

34 *See id.* art. 5.

35 *See id.* art. 7.

more supreme tribunals, and[] inferior tribunals to be chosen by the National Legislature."[36] The judiciary would "hold their offices during good behaviour; and . . . receive punctually at stated times fixed compensation."[37] Although unfinished, the Virginia Plan laid the foundation for debates with a clear vision of a popularly elected legislature as the wellspring of authority, delegating executive and judicial functions to coordinate, separate branches.[38]

The debates at the Convention whittled away the Virginia plan and separated power from the legislature. Some argued that "numerous bodies" would fail to make proper appointments because of "[i]ntrigue, partiality, and concealment."[39] James Madison, the chief architect of the Constitution,[40] and others responded that the small and limited Senate would be "sufficiently stable and independent to follow their deliberate judgments."[41] Indeed, early in the Convention, the delegates unanimously approved a plan for the Senate to unilaterally appoint judges.[42] The small states later undermined this consensus, however, when they forced an agreement to give states equal representation in the Senate.[43] Some members of the larger states, who had supported appointment of judges by the Senate, no longer felt they could support the original plan.[44] For days, the delegates to the Convention argued whether appointment by the Senate or the President would better reflect the separation of powers and popular sentiment.[45] But the power of appointment remained with the Senate until Whigs and Monarchists radically altered the text in a compromise behind closed doors.[46] The President would be selected by the Electoral College, not by the legislature.[47] Judges would be nominated

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36 *Id.* art. 9.

37 *Id.* art. 9.

38 Madison, one of the chief authors, saw the judiciary and the executive as having similar roles. Both acted merely to execute the orders of the legislature. The difference between them lay primarily in that the executive had responsibility for the collective interest and had more latitude to accomplish its goals. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 311–13 (Adrienne Koch ed.,1966).

39 *Id.* at 67.

40 Madison's work during the Convention has led him to be known as the "Father of the Constitution." *Who's the Father of the Constitution?*, LIBR. OF CONG., https://www.loc.gov/wiseguide/may05/constitution.html [https://perma.cc/7JK3-MTEK].

41 MADISON, *supra* note 3838, at 68.

42 *See id.* at 112–15.

43 *See id.* at 253–56.

44 *See id.* at 314–17.

45 *See id.* at 297–336.

46 *See* BILDER, *supra* note 32, at 211–12.

47 *See* Madison, *supra* note 38, at 573–79.

by the President, with advice and consent of the Senate, instead of by the Senate alone.[48]

B. The Appointments Clause and the Separation of Powers

The Constitution does not have only one strategy for dividing power, but rather "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[49] The independence of the judiciary from the executive exemplifies this dual strategy of "both separate and shared powers."[50] First, the Framers divided the appointment power and shared it between the executive and legislative branches.[51] Second, they created structural safeguards in the judiciary to protect its independence.[52] The process for judicial appointment is found in Article II, section II:

> [The President] shall have Power, . . . [to] nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .[53]

Contrast this language with the first section of Article II, which vests "the executive Power" in the President.[54] Section II's first words do not say that the President shall have "*the sole* power" or shall have "*the* power."[55] Rather, these first words foreshadow that the power vested in this clause is shared.

Article II limits the President's control of the judiciary by dividing the appointment power. Section II states that the President may nominate, "and by and with Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States. . . ."[56] Judges, being either of the Supreme Court or principal officers,[57] are *nominated* by the President, and *confirmed* by

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48 *See id.*

49 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

50 MICHELLE BELCO & BRANDON ROTTINGHAUS, THE DUAL EXECUTIVE: UNILATERAL ORDERS IN A SEPARATED AND SHARED POWER SYSTEM 6 (2017).

51 *See* U.S. CONST. art. II, § 2.

52 *See id.* art. III, § 1.

53 *Id.* art. II, § 2.

54 *Id.* art. II, § 1.

55 *See id.* art. II, § 2.

56 *See id.*

57 *See* Buckley v. Valeo, 424 U.S. 1, 125–27 (1976).

the Senate.[58] Although the appointment power is shared, the individual responsibilities of the branches are held to the exclusion of other actors.[59] The Senate may not coerce the President into exercising his nomination power.[60] And since the founding of the Republic, courts have refused to second-guess the President or the Senate's choices, because "[t]he power of nominating . . . and the power of appointing the person nominated, are political powers."[61] Because the Senate has sole discretion over the confirmation power, it may deny the President's nominee indefinitely.[62] Even without holding a vote, the Senate may obstruct the nominee through "senatorial courtesy, filibuster, indefinite senatorial holds on nominees, informal private meetings between senators and nominees, public confirmation hearings, and . . . the Senate Judiciary Committee."[63] When the President and a majority of the Senate are of different parties, this power is used to incredible effect.[64]

Article III separates the judicial power from the political branches. The judiciary was "designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government."[65] Specifically, the Constitution states:

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58 Some scholars argue that the advice and consent function should be read as not requiring an affirmative vote; that if enough time has passed, the President's nominee is approved. *See generally* Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940 (2013). Although that article advocated against extending this change to judicial nominees, the logic could easily be extended to judicial nominees. *See id.* at 973–74.

59 *See* Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection 1789–1861*, 100 IOWA L. REV. 551, 564 (2015).

60 *See* Orloff v. Willoughy, 345 U.S. 83, 90 (1953); Keim v. United States, 177 U.S. 290, 293 (1900).

61 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167 (1803).

62 *See, e.g.*, Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now [https://perma.cc/Z574-FGCJ].

63 Jason Eric Sharp, *Constitutional Law—Separation of Powers—Restoring the Constitutional Formula to the Federal Judicial Appointment Process: Taking the Vice Out of "Advice and Consent,"* 26 U. ARK. LITTLE ROCK L. REV. 747, 754 (2004).

64 *See, e.g.*, Christopher Wolfe, *The Senate's Power to Give "Advice and Consent" in Judicial Appointments*, 82 MARQ. L. REV. 355, 362–64 (1999). In 1987, President Reagan nominated Judge Bork to the Supreme Court. *See id.* at 362. The newly elected Democrat majority in the Senate held lengthy hearings that, along with other factors, plummeted Bork's favorability. *See id.* The Senate rejected Bork, as well as Reagan's following nomination. *See id.* Virtually no judges were rejected from 1894–1968 during which Presidents almost never faced a majority opposition in the Senate. *See id.* at 361.

65 United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955).

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.[66]

In contrast to the appointment power, "[t]he" judicial power is vested in the courts.[67] The text thus makes clear its purpose of separated branches.[68] But more than merely asserting that the judiciary is an independent institution, Article III seeks to guarantee independence through formal mechanisms.[69] First, the Constitution precludes the legislature from diminishing wages of federal judges.[70] Hamilton, who played a key role in convincing New York to accede to the Constitution by writing the Federalist Papers,[71] argued that "power over a man's subsistence amounts to a power over his will."[72] Whether or not this proposition is entirely true, the Supreme Court has acknowledged that "control over the tenure and compensation of judges is incompatible with a truly independent judiciary, free of improper influence from other forces within government."[73]

Second, the Framers created an extremely limited removal mechanism to foster judicial independence. The only constitutionally prescribed method for removal is through Article I,[74] giving the House "sole Power of Impeachment,"[75] and the Senate "the sole Power to try all Impeachments" with the "[c]oncurrence of two thirds of the Members present."[76] Indeed, the Framers heavily debated the method of

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66 U.S. CONST. art. III, § 1.

67 *Compare* U.S. CONST. art. III, § 1, *with id.* art. II, § 2, cl. 2.

68 *See id.* art. III, § 1.

69 *See id.*

70 *See id.*

71 *Federalist Papers: Primary Documents in American History*, LIBR. OF CONG., https://guides.loc.gov/federalist-papers/full-text [https://perma.cc/9N3L-QA5F].

72 THE FEDERALIST NO. 79, at 398 (Alexander Hamilton) (Ian Shapiro ed., 2009) (emphasis omitted).

73 *See* United States v. Will, 449 U.S. 200, 218 (1980); *see also id.* at 217–21 (reviewing the history of the compensation clause and its importance for judicial independence); Linda Greenhouse, *Chief Justice Advocates Higher Pay for Judiciary*, N.Y. TIMES (Jan. 1, 2007), https://www.nytimes.com/2007/01/01/us/01scotus.html [https://perma.cc/M563-YBVG] (noting that Chief Justice Roberts has advocated for increased pay to the judiciary to ensure an independent and well-staffed judiciary).

74 *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955).

75 U.S. CONST. art. I, § 2.

76 *Id.* § 3.

impeachment and removal.[77] A more lenient removal power "would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose."[78] History demonstrates that this process is rare and onerous: only fifteen judges have been impeached, and only eight have been removed.[79]

C. Judicial Appointments: 1789–1900

The appointment of judges revolves around political parties, despite the Framers' hopes that such parties would be left behind as an unfortunate vestige of the monarchial system.[80] Madison argued that the greatest advantage of the Constitution was "its tendency to break and control the violence of faction."[81] President Washington warned that "the common and continual mischiefs of the spirit of Party are sufficient to make it the interest and the duty of a wise People to discourage and restrain it."[82] It is ironic, then, that Washington heralded a Federalist administration.[83] During Washington's first term, the Federalist party occupied a majority of House seats.[84] More importantly for judicial appointments, the Federalist party controlled a majority of the Senate throughout Washington's entire administration,[85] and from 1789–1791 and 1795–1797, Federalists controlled a supermajority of this chamber.[86] This majority acted quickly to dominate the halls of government: Congress passed the Judiciary Act of 1789[87] and Washington nominated Federalists for every judicial position,[88] each con-

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77 For a discussion of the debate between the Framers regarding the wording of the impeachment and removal provisions, see *Nixon v. United States*, 506 U.S. 224, 233–35 (1993).

78 THE FEDERALIST NO. 79, *supra* note 72, at 399 (Alexander Hamilton).

79 *Judges and Judicial Administration—Journalist's Guide*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide [https://perma.cc/C9G2-Y28L].

80 *See* RON CHERNOW, ALEXANDER HAMILTON 390 (2004).

81 THE FEDERALIST NO. 10, *supra* note 72, at 47 (James Madison) (Ian Shapiro ed., 2009).

82 *Farewell Address, 19 September 1976*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-20-02-0440-0002 [https://perma.cc/JP95-ZXYR].

83 *See* Gerhardt & Stein, *supra* note 59, at 564.

84 *See Party Division of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Party-Divisions/Party-Divisions/ [https://perma.cc/AGB8-KT3B].

85 *See Party Division*, U.S. SENATE, https://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm [https://perma.cc/RXS6-QGV2].

86 *See id.*

87 ch. 20, 1 Stat. 73 (codified as amended in scattered sections of 28 U.S.C.).

88 *See* Gerhardt & Stein, *supra* note 59, at 565–66.

firmed by the Federalist-controlled Senate within two days.[89] This pattern continued until the Federalists lost control of government, at which point they attempted to pack the judiciary to frustrate their political foes.[90]

Judicial appointments were relatively streamlined during the nineteenth century because the President and Senate were generally of the same party.[91] But the appointment system did break down on the rare occasions where this unity was not established.[92] Appointments were partisan: almost every nomination to the Supreme Court was from the same party of the President,[93] and the Senate confirmation vote almost always broke down along partisan lines.[94] When the Senate was controlled by a different party than the President, the system failed. In the last year of the John Quincy Adams presidency, for example, the Jacksonian Senate refused to confirm Adams's qualified nominees.[95] Similarly, John Tyler's shift from the Democratic party to the Whig party left him with no political allies in the Senate when he assumed the presidency after Harrison's death.[96] Without political friends, he nominated true friends over the traditional party insiders.[97] It took him nine attempts to fill a Supreme Court seat.[98] Nevertheless, from 1789 to 1900, there were only twenty-two years in which the same party did not control both the presidency and the Senate, making the confirmation process relatively streamlined.[99]

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89 *See* Richard S. Arnold, *Judicial Politics Under President Washington*, 38 ARIZ. L. REV. 473, 477 (1996).

90 *See* Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 477 (2018). This action ignited a constitutional crisis in which Democratic-Republicans sought to eliminate the positions of new judges. *See id.* Federalists argued that this would violate the constitutional separation of powers. *See id.* In the end, the Supreme Court held that the offices of the judiciary could be eliminated by a Democratic-Republican passed statute, thereby removing those judges. *See* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803).

91 *See* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENT PROCESS 55–56 (2000).

92 *See id.*

93 Only three of fifty-eight nominees were not from the same party. *Id.*

94 *See* Gerhardt & Stein, *supra* note 59, at 554.

95 *See id.* at 579–80.

96 *See id.* at 587.

97 *See id.*

98 *See id.*

99 *Compare Party Division*, *supra* note 85, *with United States Presidential Election Results*, ENCYC. BRITANNICA, https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863 [https://perma.cc/A653-EH7G].

II. Separation of Powers and Appointments in the Modern Era

The Constitution's text and relevant caselaw make evident that "[t]he principle of separation of powers is embedded in the Appointments Clause."[100] The Framers sought to create a government of independent branches to prevent "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective."[101] By creating such divisions, the hope was that "[a]mbition [would] be made to counteract ambition."[102] Each branch of government would jealously guard their interests and covet the powers of the other branches.[103] Indeed, the authors of the Constitution anticipated that this political dynamic would create "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[104]

The method of selecting the President plays a critical role in how he exercises the power of nominations.[105] Historically, party figures selected candidates that they believed matched their party's beliefs, and that were broadly popular.[106] Today, however, the selection process "is one of the most complex, lengthy, and expensive in the world."[107] Although the party still retains a role in the process,[108] outside money, individualistic campaigns, new media, and the ability to win nominations through strong factional support have substantially undermined the party's role.[109] A nominee may be thrown into

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100 Freytag v. Comm'r., 501 U.S. 868, 882 (1991).

101 The Federalist No. 47, *supra* note 72, at 245 (James Madison).

102 The Federalist No. 51, *supra* note 72, at 264 (James Madison).

103 *See id.*

104 Buckley v. Valeo, 424 U.S. 1, 122 (1976).

105 *See generally* Jonathan Masters & Gopal Ratnam, *The U.S. Presidential Nominating Process*, Council on Foreign Rels. (Jan. 13, 2020, 7:00 AM), https://www.cfr.org/backgrounder/us-presidential-nominating-process [https://perma.cc/GVX7-HM9U].

106 *See* Caitlin E. Jewitt, The Primary Rules: Parties, Voters, and Presidential Nominations 23–54 (2019); *see also* Nicolas Motz, *Who Emerges from Smoke-Filled Rooms? Political Parties and Candidate Selection*, 52 Soc. Choice & Welfare 161, 161 (2019) (noting that in competitive elections, Party elites would "select candidates according to the preferences of the median voter").

107 Masters & Ratnam, *supra* note 105.

108 *See generally* Marty Cohen, David Karol, Hans Noel & John Zaller, The Party Decides: Presidential Nominations Before and After Reform (2008).

109 *See* Marty Cohen, David Karol, Hans Noel & John Zaller, *Party Versus Faction in the Reformed Presidential Nominating System*, 49 PS: Pol. Sci. & Pol. 701, 704–08 (2016).

the Presidency by a small but passionate section of the base.[110] Once President, he alone controls the entirety of the executive branch, and its four-million employees.[111] If voters do not like his performance, they have one indirect opportunity to remove him,[112] and no direct means of accountability.[113]

This Note argues that the constitutional design is outdated and no longer sufficient to protect the judiciary from undue influence by the executive. This Part focuses on presidential powers relative to the other branches. Section II.A discusses three key changes to the text and practice of the Constitution that developed in the twentieth century. Section II.B argues that those changes undermine the separation of the presidency and the courts.

A. Changes to Appointments in the Twentieth Century

Beginning in the twentieth century, three changes to the system of American government have fundamentally modified the appointment procedure: (1) the increasingly important role the judiciary plays in modern politics; (2) the Seventeenth Amendment to the Constitution, which made Senators popularly elected; and (3) the sorting of parties. Collectively, these changes have aggrandized the President's power over the appointment system, and within American government generally, contrary to the original intent of the Framers and the text of the Constitution.

1. Federal Expansion and Judicial Power

The Framers viewed the judiciary as the "least dangerous" branch of government.[114] It has no control over money and no agents under its authority are able to enforce its directives.[115] In fact, the power of judicial review was not decided until *Marbury v. Madison*,[116] and only after the Civil War did Congress permanently grant the inferior courts federal question jurisdiction.[117] This dynamic changed after the Su-

110 *See* Matthew C. MacWilliams, *Who Decides When the Party Doesn't? Authoritarian Voters and the Rise of Donald Trump*, 49 PS: POL. SCI. & POL. 716, 716 (2016).

111 *See generally The Executive Branch*, WHITE HOUSE, https://obamawhitehouse.archives.gov/1600/executive-branch [https://perma.cc/T2TL-RK84]; U.S. CONST. art. II, § 1.

112 *See infra* Section III.B.2.

113 *See* U.S. CONST. amend. XXII.

114 THE FEDERALIST NO. 78, *supra* note 72, at 329 (Alexander Hamilton).

115 *See id.*

116 5 U.S. (1 Cranch) 537 (1803).

117 *See* Act of March 3, 1875, § 1, 18 Stat. 470 (current version at 28 U.S.C. § 1331(a)). For a more detailed description of the expansion of judicial authority by statute, see generally FELIX

preme Court reinterpreted aspects of the Constitution to facilitate federal action.[118] In particular, the Court's reinterpretation of the Commerce Clause allowed Congress to implement an array of statutes that were previously nonstarters.[119] The expansion of federal action entailed greater importance for the courts: in the 1930s only ten percent of cases in federal court involved nonproperty cases, but by the 1960s, most federal cases involved constitutional issues.[120]

Today, many of the nation's most fundamental issues are decided by the Supreme Court, rather than litigated in Congress.[121] Since the turn of the millennium, the Court has heard cases on rights of gun ownership,[122] recognition of same sex marriages,[123] the regulation of money in politics,[124] and whether transgender individuals are protected under the Civil Rights Act of 1964.[125] Judges are expected to protect the party's legislation from legal criticism, and the composition of the Court has an enormous effect on a President's agenda and legacy.[126]

2. The Seventeenth Amendment

Senators were originally chosen by state legislatures.[127] One purpose of this design was to make the Senate resistant to the short-term fluctuations in public sentiment.[128] To a significant degree, the old de-

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FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (2006).

118 *See* Alfred C. Aman Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1109–16 (1988).

119 *See id.*

120 NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 13–14 (2005).

121 *See id.*

122 *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

123 *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

124 *See* Citizens United v. FEC, 558 U.S. 310 (2010).

125 Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a–2000h); *see* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

126 *See* Gerhardt, *supra* note 93, at 132.

127 U.S. CONST. art. 1, § 3.

128 *See* Wendy J. Schiller, Charles Stewart III & Benjamin Xiong, *U.S. Senate Elections Before the 17th Amendment: Political Party Cohesion and Conflict 1871–1913*, 75 J. POL. 835, 836 (2013). Many of the Framers were deeply worried about unchecked public sentiment. As stated in the Federalist papers, "The danger of disturbing the public tranquillity by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions to the decision of the whole society." THE FEDERALIST NO. 49, *supra* note 72, at 258 (James Madison).

sign insulated Senators from political pressure.[129] Because politicians in state legislatures have knowledge and interests that are distinct from the public they represent, parties in state legislatures were not always able to "contain internal factions and competing interests to reach agreement."[130] As a result, "Senate elections were contentious, and winning majority control of the state legislature did not always ensure an easy electoral process."[131] With the enactment of the Seventeenth Amendment to the Constitution, however, senators were "elected by the people thereof."[132] The effect of this change was substantial and immediate: senators changed their voting patterns, particularly before elections.[133]

Accountability generally is a positive characteristic, but it can have adverse consequences. As a result of their dependence on private interest groups to mobilize voters, directly-elected senators depend more on lobbyists.[134] Increasingly, the same advocacy groups influencing the President play a major role in Senate confirmations.[135] This shift has been fueled by the advent of new media platforms, including radio and TV, which allowed lobbyists to easily critique candidates and disseminate information.[136] Senators historically played a major role in selecting nominees and advising the President, but the Seventeenth Amendment effectively diverted nominations from elected representatives to ideological lobbyists.[137]

3. Sorted Political Parties in Competitive Politics

Two trends are necessary in understanding U.S. politics. First, members of the American parties share little in common. Second, neither party has been able to stay in government, enact its agenda over a long-time horizon, and be held accountable for those actions. Those dual features have led the parties to fight more bitterly against one another, and to seek alternatives to legislation to enact their agenda.

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129 *See* Schiller et al., *supra* note 128, at 836.

130 *Id.* at 835.

131 *Id.*

132 U.S. CONST. amend. XVII, § 1.

133 *See* William Bernhard & Brian R. Sala, *The Remaking of an American Senate: The 17th Amendment and Ideological Responsiveness*, 68 J. POL. 345, 345 (2006).

134 *See generally* Kathleen Bawn, Martin Cohen, David Karol, Seth Masket, Hans Noel & John Zaller, *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSPS. ON POL. 571 (2012).

135 *See* Gerhardt, *supra* note 93, at 69–70.

136 *See id.* at 72–73.

137 *See id.* at 50, 70.

Despite partisan conflict in Congress, the American public is not more partisan than it was historically.[138] There are approximately as many people with "liberal" and "conservative" beliefs as there were in previous eras.[139] What has changed, however, is that the parties have become clearly demarcated: liberals join the Democratic party and conservatives the Republican party.[140] This pattern of particular groups moving toward one party to represent them is called "sorting."[141] Sorting makes each party more internally homogenous and increasingly distinct from the other.[142] Although sorting was not unknown in America, for many decades the national parties were more an amalgamation of various local interests than cohesive and centralized organizations.[143]

Sorted parties may be desirable. The overwhelming majority of voters know little about politics and are unable to keep up with each politician's individual views, stances, and voting record.[144] Sorting helps ensure that parties are accountable because voters know the positions of the parties for which they are voting.[145] When a party has the capacity to govern, that information is slowly disseminated to the public, with elections acting as a referendum on the party's actions.[146] Thus, as "long as the majority party governs competently and wins popular approval, it continues in office."[147]

When parties are of roughly equal political power, however, the unique nature of the American system undermines accountability and exacerbates issues with sorted parties. Sorting leads individuals to

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138 *See* Morris P. Fiorina, UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING & POLITICAL STALEMATE 23–25 (2017).

139 *See id.*

140 *See id.* at 77.

141 EZRA KLEIN, WHY WE'RE POLARIZED 42, 48 (2020).

142 *See* Fiorina, *supra* note 138, at 77.

143 *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 135–37 (1957). Some have argued that unsorted, nonpolarized parties are an aberration. *See generally* KLEIN, *supra* note 141, at 1–101 (noting that the United States is the only nation with long-standing nonsorted parties, and that this scenario arose out of peculiarities of American political history).

144 *See generally* RICK SHENKMAN, JUST HOW STUPID ARE WE?: FACING THE TRUTH ABOUT THE AMERICAN VOTER (2009) (noting that misinformation, spin, and other manipulative techniques make it difficult for the average voter to follow politics effectively). For the argument that voters are well informed, see Donald Wittman, *Why Democracies Produce Efficient Results*, 97 J. POL. ECON. 1395, 1399–1401 (1989). For the argument that voters are not only misinformed, but irrational, see BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICY 2 (2007).

145 *See* DOWNS, *supra* note 143, at 112–15.

146 *See* FIORINA, *supra* note 138, at 84; *see also* MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS 89–106 (1981).

147 FIORINA, *supra* note 138, at 68.

view members of the other party as more extreme than they are.[148] And because sorted parties are actually further away from each other politically, their capacity for bipartisanship or cooperation is greatly diminished.[149] The unique nature of U.S. institutions, which demand massive majorities to pass legislation, compounds this issue.[150] When one party has a mandate, Congress operates as intended; but when the parties are roughly equal in political power, the system creates divided government wherein neither party is viewed as legitimate.[151] Without the ability to pass laws, each party is pushed by their ever-demanding base to ignore norms that might otherwise moderate their behavior.[152]

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American democracy is thus caught in a powerful web that undermines the appointment system. Each political faction views the other with disdain and suspicion, but neither is able to consistently implement their political preferences through legislation.[153] The judicial branch is thus called upon to bypass legislative gridlock.[154] The Seventeenth Amendment makes the Senate, once imagined as a stalwart against such public demands, susceptible to public passions, leading politics to course through judicial confirmations.[155] Interest groups play a commanding role in the selection and confirmation of judicial

148 *See id.* at 60–61.

149 *See id.* at 78. This does not mean that Congress does literally nothing. Each party worries primarily that the other party will receive public recognition for passing good legislation. Thus, where there is less media attention on a bill, the greater likelihood that it is to pass. *See* Simon Bazelon & Matthew Yglesias, *The Rise and Importance of Secret Congress*, SLOW BORING (June 21, 2021), https://www.slowboring.com/p/the-rise-and-importance-of-secret [https://perma.cc/SUA3-MBHB].

150 *See* Fiorina, *supra* note 138, at 85.

151 Because many do not have a deep understanding of the American governmental system, most people do not know who to blame when things are not working. In general, blame is shifted on the parties in Congress. *See* Stephen P. Nicholson, Gary M. Segura & Nathan D. Woods, *Presidential Approval and the Mixed Blessing of Divided Government*, 64 J. POL. 701, 701–02 (2002) (noting that Presidents often shift blame onto Congress); *see also* KLEIN, *supra* note 141, at 180–86 (noting that Presidential systems like the United States, in contrast to Parliamentary or semi-Presidential systems, have failed in every other attempt).

152 *See* KLEIN, *supra* note 144, at 180–86.

153 *See id.*; FIORINA, *supra* note 138, at 5–6.

154 Empirical research demonstrates that where parties are factionalized, or where long-term decisions are unlikely to pay off in the political system, political actors use courts for change. *See* Nickolas E. Jorgensen, Cleavages, Courts, and Credible Commitments: The Politics of Judicial Independence 5 (2006) (Ph.D. dissertation, University of Michigan) (ProQuest).

155 Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 589 (1963); *cf.* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

nominees.[156] Those interest groups press for individuals aligned with them, and their ideological preferences, rather than the assorted and contradictory interests of a broad-based party.[157]

B. Weakening Constitutional Safeguards

Changes to the text and practice of the Constitution leave the judiciary susceptible to undue influence. The judiciary is not a tool or extension of the executive, but it is biased toward presidential preferences. This Section discusses the reasons why sharing powers with the Senate fails as a political safeguard, and then why the Article III protections are an insufficient constitutional check.

1. Advice and Consent

In the judicial nomination process, the office and powers of the President are at a decided advantage over the institutional preferences of the Senate. The President connects personally with the nominee and lures out the individual's judicial philosophy.[158] Those seeking nomination to the bench undergo long and complicated interviews, and may be asked to make their case for selection to the President himself.[159] Interested Presidents may freely ask candidates anything behind closed doors.[160] In contrast, judicial candidates often refuse to answer substantive questions from senators, arguing that it violates the separation of powers.[161] Even if the Senate wanted to protect its

156 Shapiro, *supra* note 155, at 589.

157 *Id.*

158 *See* CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 135–40 (2007). During the Trump administration, for example, aide Don McGahn played the pivotal role of screening judicial nominees. *See* Peter Nicholas, *Trump's Fury at Don McGahn Is Misplaced*, ATLANTIC (May 22, 2019), https://www.theatlantic.com/politics/archive/2019/05/don-mcgahn-helped-trump-remake-federal-courts/589957/ [https://perma.cc/9X8X-RUGU]. Because of his close ties to the Federalist Society and other conservative circles, McGahn "develop[ed] a pipeline of candidates" who would dramatically expand the conception of executive power. *Id.* For Supreme Court picks, McGahn selected a large list of candidates, giving the President wide space to interview, and choose between, potential contenders. *See* Joel Achenbach, *How Trump and Two Lawyers Narrowed the Field for His Supreme Court Choice*, WASH. POST (July 8, 2018), https://www.washingtonpost.com/politics/how-trump-narrowed-the-field-for-his-supreme-court-pick/2018/07/08/b9d3b16a-808c-11e8-b660-4d0f9f0351f1_story.html [https://perma.cc/9DSE-N7PV]. Indeed, McGahn's close experiences working alongside other lawyers at Jones Day, Patton Boggs, and the National Republican Congressional Committee played an instrumental role in understanding their judicial philosophy and narrowing the field. *See id.*

159 EISGRUBER, *supra* note 158, at 140.

160 *See id.*; *see, e.g.*, Achenbach, *supra* note 158.

161 *See* BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES 67–68 (2006).

interests through the judiciary, senators have to rely on previous decisions of nominees to glean a candidate's philosophy.[162]

This informational asymmetry is not new. The President always could speak to the judges he nominated.[163] What is different is the weakened state of parties in selecting nominees and restraining the President.[164] Parties once stood as gatekeepers against populism and demagoguery, but today are too weak to stand against their electoral base, or against the Presidents chosen by that constituency.[165] Historically, potential judicial nominees came up through the party's representatives in Congress and other party actors.[166] Nominees therefore had close relationships with politicians throughout the country and were more sympathetic to the legislature.[167] The Senate has, however, been largely replaced by a small group of highly motivated members of the public who demand that nominees share in their political preferences.[168] Lobbyists groups advocate directly to the President and place their members throughout the halls of government.[169]

Nor can the Senate easily protect its interests. Cooperation is difficult in large and diverse multimember bodies.[170] The President has the dominant position in such a confrontation because he never has to nominate anyone to the Senate's liking.[171] The Senate's recourse, rejecting all nominees, is likely to fail because senators hope to work with the President on other legislative agendas.[172] Because of political sorting, a President and Senate controlled by different parties will be unlikely to cooperate on appointments.[173] The Senate is thus divided between naysayers and partisan devotees; when the President's party

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162 *See* EISGRUBER, *supra* note 158, at 161–62.

163 President Tyler, for example nominated eight nominees that were rejected before a compromise was reached. *See* Gerhardt & Stein, *supra* note 59, at 587.

164 This phenomenon is sometimes referred to as an era of weak parties and high partisanship. *See, e.g.*, Julia Azari, *Weak Parties and Strong Partisanship Are a Bad Combination*, VOX (Nov. 3, 2016, 4:40 PM), https://www.vox.com/mischiefs-of-faction/2016/11/3/13512362/weak-parties-strong-partisanship-bad-combination [https://perma.cc/2D8N-FTL5].

165 *See* KLEIN, *supra* note 141, at 172–73, 178–79.

166 *See* GERHARDT, *supra* note 93, at 50–51.

167 *See id.*

168 *See id.* at 70–72.

169 *See* SCHERER, *supra* note 120, at 13; *see also supra* note 158 and accompanying text.

170 *See* THE FEDERALIST NOS. 76, 77 (Alexander Hamilton).

171 *See* THE FEDERALIST NO. 77 (Alexander Hamilton).

172 *See infra* Section III.C.

173 *See supra* Section II.A.2; *see also supra* Section II.B (discussing cases of frustration in judicial appointments when the President and Senate were of different parties).

controls Congress, senators will have strong calls from their base to support the President's nominations.[174]

Members of the same party have strong incentives to avoid fights that undermine the position of the President or his nominee.[175] Not only would doing so hurt their immediate political standing, but it would hurt the President's—and by extension their—legacy.[176] Moreover, the President will threaten allied Senators who obstruct or harass his appointees.[177] Even if the President "cannot reshape the contours of the political landscape,"[178] he can powerfully employ the position of his office to focus public attention squarely on a senator's intransigence.[179] Senators must weigh the potential for embarrassment, harassment, and refusal by the President to cooperate, against vague notions of institutional capacity, and the chance that individual judges will expand the executive power.[180]

2. Judicial Independence

The formal independence of the judiciary does not secure it from favoritism towards the President. Even if judges face no pressure from the executive, Presidents will have picked nominees *because* they honestly share his view of Presidential power.[181] Judges have long been

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174 *See* SCHERER, *supra* note 120, at 11–13.

175 *See* GERHARDT, *supra* note 93, at 44, 132. It seems increasingly likely that most judicial positions will be filled only when the President and Senate are the same party. *See* Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 530–31 (1998).

176 *See* GERHARDT, *supra* note 93, at 44, 132.

177 For an introduction to the President's persuasion power, see GEORGE C. EDWARDS III, THE STRATEGIC PRESIDENT: PERSUASION AND OPPORTUNITY IN PRESIDENTIAL LEADERSHIP 1–18 (2009).

178 *Id.* at 188.

179 *See id.* at 188–89; *see also* Henriët Hendriks, The Battleground Effect: How the Electoral College Shapes Post-Election Political Attitudes and Behavior 152–69 (2009) (Ph.D. dissertation, University of Minnesota) (noting that Senators often rely on Presidents for reelection). During the Kavanaugh hearings, for example, Trump lobbied vulnerable Democrats to support the nominee. *See* Ella Nilsen, *Trump Is Starting to Pressure Red-State Democrats to Support His Supreme Court Pick*, VOX (July 9, 2018, 9:13 PM), https://www.vox.com/2018/7/9/17549092/red-state-democrats-trump-supreme-court-nominee-brett-kavanaugh [https://perma.cc/CS3F-ZB9E]. One of these senators, Joe Manchin, helped push then-Judge Kavanaugh over the line in a 50–48 vote. Emily Knapp, Brent Griffiths & Jon McClure, *Kavanaugh Confirmed: Here's How Senators Voted*, POLITICO (Oct. 6, 2018, 4:02 PM), https://www.politico.com/interactives/2018/brett-kavanaugh-senate-confirmation-vote-count/ [https://perma.cc/93BL-8QFH].

180 *See* Justin H. Kirkland & R. Lucas Williams, *Representation, Neighboring Districts, and Party Loyalty in the U.S. Congress*, 165 PUB. CHOICE 263, 263 (2016); *see also* Edward T. Swaine, *The Political Economy of* Youngstown, 83 S. CAL. L. REV. 263, 297 n.147 (2010).

181 *See* Grove, *supra* note 90, at 508–11. President Franklin Roosevelt, for example, attempted to pack the court with judges sympathetic to his views. *See id.*

chosen because they share political visions with the President.[182] President Nixon, for example, boldly announced that he would nominate judges to more severely punish criminal offenders.[183] The Supreme Court has implicitly acknowledged the power of nominations in their opinions regarding removals.[184] After removing officers, the President appoints those who act more in line with his interests.[185] This logic implies that, in general, the President consistently appoints those with his preferences.[186]

Presidents do face setbacks, but these examples are rare and extreme.[187] Roosevelt's attempt to pack the Supreme Court failed because it was a unique and aggressive attack on both the judiciary and senatorial legitimacy.[188] The rejection of Reagan's nominee, Judge Robert Bork, occurred after Republicans had lost the Senate, making his nomination a political burden as soon as it reached the Judiciary Committee.[189] Similarly, while the Supreme Court exercised its independence by unanimously ordering that President Nixon turn over his recordings,[190] the Court merely held that there is no "*absolute, unqualified* Presidential privilege of immunity from judicial process under all circumstances."[191] The Court only mustered this narrow holding when the President was at twenty-five percent approval during the impeachment trial.[192] But the Court's willingness to hold Presidents accountable did not survive long past this moment of Presidential vulnerability, as the Court soon granted Nixon a novel executive privilege theory,

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182 *See* LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 60 (2006). Both Washington and Adams filled the court with Federalist judges. *See id.*

183 S. Sidney Ulmer & John A. Stooley, *Nixon's Legacy to the Supreme Court: A Statistical Analysis of Judicial Behavior*, 3 FLA. ST. U. L. REV. 331, 331–32 (1975); *see also* SCHERER, *supra* note 120, at 36.

184 *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197–200 (2020) (explaining that the President's removal power enables him to better control the bureaucracy).

185 *See id.*

186 *See id.*

187 *See* EISGRUBER, *supra* note 158, at 132–34.

188 *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 275–77 (2017).

189 Then-Senator Joe Biden, for example, declared that blocking Bork was analogous to stopping court packing. *See* Grove, *supra* note 90, at 514.

190 Nixon v. United States, 418 U.S. 683, 683 (1974).

191 *Id.* at 706 (emphasis added).

192 *See* Andrew Kohut, *From the Archives: How the Watergate Crisis Eroded Public Support for Richard Nixon*, PEW RSCH. CTR. (Sept. 25, 2019), https://www.pewresearch.org/fact-tank/2019/09/25/how-the-watergate-crisis-eroded-public-support-for-richard-nixon/ [https://perma.cc/3CC3-PX6W].

encompassing "absolute immunity from damages liability predicated on his official acts."[193]

The President's powers allow him to bring favorable cases to the courts, thereby influencing the law in his favor. The exact contours of the law are often unclear, and judicial results uncertain.[194] In particular, the "comprehensive and undefined"[195] powers of Article II create enormous hurdles in conflicts over the separation of powers. The President is vested with the executive power[196] and an obligation to ensure that the laws "be faithfully executed."[197] But the lack of clarity about these phrases has left a "zone of twilight"[198] in which the President's powers, relative to the other branches, remain unclear. Because the executive generally has enforcement discretion, the President may bring cases that have good facts if his actions are challenged.[199]

The impact of discretion cannot be understood until its absence is felt. In *Department of Commerce v. New York*,[200] for example, the Court ruled that the administration could not add a citizenship question to the census, because its stated rationale was "incongruent with what the record reveal[ed] about the agency's priorities and decision-making process."[201] Justice Roberts noted that the Court's "review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'"[202] The Court concluded that "[i]n these unusual circumstances, the District Court was warranted in remanding to the agency."[203] This case illustrates a moment where the administration failed to have its way because of simple, self-imposed errors.[204] In

193 *See* Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

194 *See* EISGRUBER, *supra* note 158, at 21–30.

195 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J. concurring).

196 U.S. CONST. art. II, § 1.

197 *Id.* § 3.

198 *See Youngstown*, 343 U.S. at 637.

199 *See* Heckler v. Chaney, 470 U.S. 821 (1985) (holding that the FDA's decision not to enforce agency regulation is unreviewable as agency inaction). In certain areas of policy, such as foreign policy, executive deference is even greater. *See* Haig v. Agee, 453 U.S. 280, 291 (1981).

200 139 S. Ct. 2551 (2019).

201 *Id.* at 2575–76.

202 *Id.* (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977)).

203 *Id.* at 2576.

204 Similarly, after the Trump administration failed multiple times to implement a Muslim ban due to poor agency coordination, one legal commentator referred to the administration as "malevolence tempered by incompetence." Benjamin Wittes, *Malevolence Tempered by Incompetence: Trump's Horrifying Executive Order on Refugees and Visas*, LAWFARE (Jan. 28, 2017, 10:58 AM), https://www.lawfareblog.com/malevolence-tempered-incompetence-trumps-horrifying-executive-order-refugees-and-visas [https://perma.cc/U892-HWBV].

general, however, a strategic President will manipulate timing and situations to aggrandize his position.[205]

Legal-political dynamics between the President and Congress further strengthen the Presidency. In *Youngstown Sheet & Tube Co. v. Sawyer*,[206] Justice Jackson stated that where the President acts with the blessing of Congress, he acts with all the power of the federal government.[207] But where he acts "in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers."[208] To avoid Congressional disapproval, the President is therefore encouraged to avoid Congress altogether.[209] An active Congress may respond to executive overreach by passing legislation to rebuff the President.[210] As noted previously, however, legislators have been relegated to performers for their base.[211] When the President's party controls one of two chambers––or at least one-third of the Senate––it is highly unlikely that Congress can act through legislation.[212] Compounding this issue, Congressional activity might be read by

205 Justice Jackson noted that a single holding for the President can distort constitutional meaning forever. "[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution . . . the Court for all time has validated the principle . . . ." Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

206 343 U.S. 579 (1952).

207 *See id.* at 635–37.

208 *Id.* Jackson's *Youngstown* framework is popular among the Court and members of Congress. *See* Swaine, *supra* note 180, at 267 n.15; Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1217 (2006).

209 *See* Swaine, *supra* note 180, at 304–24.

210 *See id.* at 325–39.

211 *See supra* Section II.A; *see, e.g.*, Drew DeSilver, *Congress Continues Its Streak of Passing Few Significant Laws*, PEW RSCH. CTR. (July 31, 2014), https://www.pewresearch.org/fact-tank/2014/07/31/congress-continues-its-streak-of-passing-few-significant-laws/ [https://perma.cc/LVN9-BGND].

212 *See supra* Section II.A.3.

courts as an acquiescence of those powers.[213] In this twilight sleep of Congress, presidential power ever grows.[214]

III. Speaker as Nominator

Part II argued that the President should not hold the power of nomination because this power creates a separation of powers conflict of interest. Instead, this Note proposes the Speaker be the nominator. Her office is more accountable and more democratically representative than the President. She is responsible to the public through regular elections and by the factions of her party. And because the Speaker is nominated by members from across the country, she better exemplifies the geographic and ideologic diversity of the country. Finally, because she lacks significant control of the bureaucracy and is chosen by the caucus, not the public, her office does not threaten the separation of powers.

A. Proposal

Hamilton argued the advantage of the President in nominations was that "as far as republican principles will admit, [he has] all the requisites to energy."[215] He then asked if the appointment system "combine[s] the requisites to safety, in a republican sense––a due dependence on the people, [and] a due responsibility?"[216] This Note has argued that the energy of the executive in its modern adaptation offers too much preference to the President. To address similar issues, some other proposals strip the appointment system from the political

213 *See, e.g.*, Comm. on Judiciary v. McGahn, 951 F.3d 510, 519 (D.C. Cir. 2020) (holding that Congress lacked standing to sue to enforce its subpoenas, in part because "the political branches have long resolved most of their differences through 'negotiation and accommodation'" (quoting Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. Chi. L. Rev. 1083, 1132 (2009))). Although overruled by *Comm. on Judiciary v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020) (en banc), this case demonstrates pitfalls for Congress wherever courts "have few authorities to guide [them]—sparse constitutional text, no statute, a handful of out-of-context cases, and a set of more-or-less ambiguous historical sources." *McGahn*, 951 F.3d at 518; *see also* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 23 (2015) (holding the recognition power to belong exclusively to the President in part because "the major historical examples . . . establish[] no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power").

214 As Justice Jackson noted in an earlier version of his opinion, "If [Congress] does not rise to its occasions, if it is petty, partisan, or indecisive[,] power will gravitate to the Executive by force of public opinion whether this Court affirms or not." Robert H. Jackson, Draft Concurrence, Youngstown Sheet & Tube Co. v. Sawyer at 28 (May 22, 1952) (on file with the Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 176).

215 *See* The Federalist No. 77, *supra* note 72, at 390 (Alexander Hamilton).

216 *Id.*

branches.[217] This Note presumes that because of the judiciary's important political role, partisan factions will continue to struggle over the appointment procedure.[218] Given this inevitable conflict, the important choice of judicial appointments should be responsive to the public will.

The Framers considered giving the appointment power to the House but rejected that approach. Hamilton wrote:

> I cannot imagine that [uniting the House of Representatives for making appointments] is likely to gain the countenance of any considerable part of the community. A body so fluctuating and at the same time so numerous, can never be deemed proper for the exercise of that power. Its unfitness will appear manifest to all . . . . All the advantages of the stability, both of the Executive and of the Senate, would be defeated by this union, and infinite delays and embarrassments would be occasioned.[219]

Hamilton's demand for nominations by a single person is powerful.[220] This Note's proposal accepts that multimember bodies are improper, and suggests vesting *solely* the Speaker with the power, subject to advice and consent of the Senate. As a result, her office would remain the "single object for the jealousy and watchfulness of the people."[221] The office of the Speaker takes advantage of the separation of powers system by keeping the nomination power within the political branches, but in an office with greater dependence on the people (referred to by Hamilton as democratic representation), and due responsibility (referred to by Hamilton as accountability).

The President could theoretically delegate nominations to the Speaker without any change in the law. President Carter, for example, left the choice of many of his nominees to a merit-selection board.[222] But because this would be a political and not legal solution, lasting change would require a constitutional amendment.[223] Amendments

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217 *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 193 (2019).

218 *See supra* Sections II.A.1–3.

219 THE FEDERALIST NO. 77, *supra* note 72, at 389–90 (Alexander Hamilton).

220 Indeed, only two states now use legislatures for judicial nominations. *See id.*; *see also* THE FEDERALIST NO. 70, *supra* note 31, at 472 (Alexander Hamilton) ("The ingredients, which constitute energy in the executive, are first unity, secondly duration, thirdly an adequate provision for its support, fourthly competent powers.").

221 THE FEDERALIST NO. 70, *supra* note 31, at 479 (Alexander Hamilton).

222 *See* Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 254 (1978).

223 *See* U.S. CONST. art. V.

generally require two-thirds of both chambers of Congress or two-thirds of states to propose the amendment.[224] Three-fourths of states would then have to vote to ratify the change.[225]

B. Advantages of the Speaker as Judicial Nominator

Congressional structure plays a significant role in the Speaker's incentives. Congress is divided into a Senate and a House of Representatives.[226] The House is "composed of members chosen every second year by the people of the several states,"[227] and current law states that there are 435 members.[228] The Constitution does not dictate how members are selected, leaving that issue to Congress and the states.[229] In the modern era, states use single-member districts, wherein a single candidate is elected.[230] Once the members of the House are elected, they are responsible for "ch[oosing] their Speaker and other Officers."[231] In modern practice, the party caucuses select their nominations for Speaker,[232] who is then chosen by majority vote.[233] Only three Speakers have resigned from the position, an additional four have resigned from the House, and none has ever been formally removed.[234]

1. Accountability

This Section argues that the Speaker is more accountable to the American public than the President. This is a result of two major factors. First, her Party has the power and the incentive to choose candidates popular with the public. Second, elections hold her and her

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224 *Id.*

225 *Id.*

226 U.S. CONST. art. I, § 1.

227 *Id.* § 2.

228 *See* 2 U.S.C. § 2a; Mark Strand & Tim Lang, *How the House Elects Its Speaker*, CONG. INST. (Dec. 28, 2018), https://www.congressionalinstitute.org/2018/12/28/how-the-house-elects-its-speaker/ [https://perma.cc/528Q-5GGA].

229 U.S. CONST. art. I, § 4.

230 2 U.S.C. § 2(c) (requiring "no district to elect more than one Representative," except under certain conditions). States are not required to use single-member districts. For a history on their use, see generally JAY K. DOW, ELECTING THE HOUSE: THE ADOPTION AND PERFORMANCE OF THE U.S. SINGLE-MEMBER DISTRICT ELECTORAL SYSTEM (2017).

231 U.S. CONST. art. I, § 2.

232 VALERIE HEITSHUSEN, CONG. RSCH. SERV., R44243, ELECTING THE SPEAKER OF THE HOUSE OF REPRESENTATIVES: FREQUENTLY ASKED QUESTIONS 2 (2020), https://fas.org/sgp/crs/misc/R44243.pdf [https://perma.cc/9KJT-RHE8].

233 *See id.*

234 *See id.* at 1 n.2.

political party accountable when they fail to nominate generally acceptable judges.

The first means of accountability stems from the fact that the Speaker is accountable to the elected representatives of her party. The House has the sole power of choosing the Speaker and removing her.[235] The Speaker knows that "a tribal partisan loyalty strengthens [the Speaker], *provided* he or she delivers the electoral and policy goods."[236] These members, in return, are closely connected to their constituents, and are pressured to support popular nominees.[237] As a result, members of the House would pressure the Speaker to choose popular judicial nominees and to avoid those who would be controversial with her party or the broader electorate.[238] Relatedly, she is disincentivized from choosing nominees whose ideology is far from the mainstream.[239]

A second major consequence is that the party has significant control over the selection of nominees.[240] The Speaker is in a precarious situation: at any moment a majority of her party could remove her for someone who can do the job better.[241] This, in turn, means that party leaders share information with their caucus and need to consider the entire party's policy preferences when deciding who to nominate or what to place on the legislative agenda.[242] This dynamic respects the

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235 *See* U.S. CONST. art. I, § 2.

236 *See* Richard Heffernan, *Exploring (and Explaining) the British Prime Minister*, 7 BRITISH J. POL. & INT'L RELS. 605, 611 (2005) (emphasis added).

237 In 2020, for example, Pew found that sixty-four percent of individuals cited Supreme Court appointments as "very important" to their vote. *Election 2020: Voters are Highly Engaged, but Nearly Half Expect to Have Difficulties Voting*, PEW RSCH. CTR. (Aug. 13, 2020), https://www.pewresearch.org/politics/2020/08/13/election-2020-voters-are-highly-engaged-but-nearly-half-expect-to-have-difficulties-voting/ [https://perma.cc/C3UC-ZR22].

238 This dynamic has been reflected in the bills party leaders introduce. *See* GARY W. COX & MATHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES 17–49 (2005).

239 *See generally* André Blais, Richard Nadeau, Elisabeth Gidengil & Nail Nevitte, *The Formation of Party Preference: Testing the Proximity and Directional Models*, 40 EUR. J. POL. RSCH. 81 (2001) (evaluating models of voter behavior and finding that a legislator's proximity to voters' preferences do better electorally).

240 Kaare Strøm, *Delegation and Accountability In Parliamentary Democracies*, 37 Eur. J. Pol. Rsch. 261 (2000). It is impossible to know exactly what mechanisms the party would use to influence the Speaker. As discussed *supra* Section III.B.1, however, judicial appointments historically came up through recommendations by the party, as opposed to interest groups lobbying the President, implying a similar dynamic would likely occur.

241 *See supra* notes 232–39.

242 *See supra* notes 232–39.

diversity of the party, winnows candidates, and provides a remedy when Speakers gamble the political lives of members.[243]

Contrary to being a weakness, the possibility of removal is a strength of the Speaker. The Speaker's power is contingent on the size of her majority: she will have more flexibility the larger her caucus is.[244] Similarly, the larger some faction in Congress, the more likely that that faction will influence her decisions or deny her legislative power.[245] When a Speaker is plagued by multiple factions able to deny a majority, her Speakership will be under threat.[246] This dynamic makes legislation difficult, even if the Speaker is replaced.[247] Nevertheless, because party leaders are able to exert substantial influence over their caucus, even when it is highly divided, the possibility of replacing the Speaker is unlikely to materialize.[248]

This dynamic would likely also appear in judicial nominations and would occasionally slow the nomination process. Insofar as intraparty divisions occasionally prevent nominations, that is desirable. Party rules state that the Speaker needs only a simple majority of their own party to secure the Speakership.[249] Thus, the Speaker might only

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243 The Supreme Court has similarly recognized this method of accountability in removal cases. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010) ("[T]he Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.").

244 *See* Wilhelmina Jacoba Maria de Ruiter, Walking, the Tightrope: Political Accountability, Blame, and Ministerial Survival in Two Parliamentary Systems 35–38 (2019) (Ph.D. dissertation, Utrecht University).

245 *See* Carly Schmitt, Chera LaForge & Hanna K. Brant, *Drinking the Tea: The Tea Party Movement and Legislative Agendas in the U.S. Senate*, 46 CONG. & PRESIDENCY 60, 60–61 (2019).

246 In 2015, for example, Speaker John Boehner suddenly stepped down. *See* Matthew Yglesias, *John Boehner's Resignation, Explained*, VOX (Sept. 25, 2015, 12:22 PM), https://www.vox.com/2015/9/25/9397997/john-boehners-resignation-explained [https://perma.cc/59LM-8NT8]. This was incredibly rare, as party leaders "normally either step[] down following an electoral defeat or else . . . announce[] it well in advance and calmly lead[] the troops through one last election campaign." *Id.* His resignation was caused by a Tea Party willing to shut down the government, against the preferences of the Speaker and other members of his caucus. *See id.*

247 After Boehner stepped down, Republicans had difficulty choosing a speaker. Paul Ryan, looked to by all factions of the party, did not want to take the position because the caucus was so obviously wrought with factionalism. *See* Kelsey Snell, *Why Paul Ryan Doesn't Want to Be House Speaker*, WASH. POST (Oct. 8, 2015), https://www.washingtonpost.com/news/powerpost/wp/2015/10/08/why-paul-ryan-doesnt-want-to-be-house-speaker/ [https://perma.cc/3R63-XFKF].

248 *See* STRØM ET AL., *supra* note 240, at 69 (noting that factions balk at the "doomsday device" of removal).

249 *See, e.g.*, OFF. OF THE PARLIAMENTARIAN, 115TH CONG., COMPILATION OF SELECTED RULES OF THE REPUBLICAN CONFERENCE AND DEMOCRATIC CAUCUS (Comm. Print 2017) ("[A] majority vote of those present and voting at a Democratic Caucus shall bind all Members of the Caucus.").

represent one-half of one-half of the House.[250] Intraparty factionalism may thus prevent a Speaker who represents so few from taking permanent action on behalf of the nation.[251]

In addition to her accountability through the party, the Speaker is accountable through elections. If the Speaker's party loses a majority of seats, she will lack the majority to survive removal or pass legislation.[252] Party leaders are also pressured to step down after they lose substantial seats in elections.[253] Speakers therefore have an interest, both for their own survival and to enforce their preferred policies, in their caucus winning elections. The nomination of then-Judge Kavanaugh shortly before the 2018 midterms illustrates this point. Kavanaugh was deeply unpopular at the time of his nomination[254] and became increasingly unpopular after Christine Blasey Ford accused him of sexually assaulting her.[255] Particularly in the House, Republi-

250 *See id.*; Strand & Lang, *supra* note 228.

251 In 2012, for example, Republicans won a majority of the chamber with a minority of the votes. *Election Statistics: 1920 to Present*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Election-Statistics/Election-Statistics/ [https://perma.cc/8XEW-X3RX]. Because of his limited caucus, Speaker Boehner had more defections "than in any other speaker's election in over two decades." Micah Cohen, *Were the G.O.P. Votes Against Boehner a Historic Rejection?*, FIVETHIRTYEIGHT (Jan. 4, 2013, 8:10 AM), https://fivethirtyeight.com/features/were-the-g-o-p-votes-against-boehner-a-historic-rejection/ [https://perma.cc/Y6BA-6PDN]. The Freedom Caucus was able to block Boehner from passing key legislation. *See* Lauren Fox, *John Boehner Unchained: Why the House Speaker Finally Stood Up to the Far Right*, U.S. NEWS (Dec. 12, 2013, 5:24 PM), https://www.usnews.com/news/articles/2013/12/12/john-boehner-unchained-why-the-house-speaker-finally-stood-up-to-the-far-right [https://perma.cc/TTN6-SQ99]. Boehner only passed appropriations bills when he bucked those members of his party and cooperated with Democrats. *See id.*

252 *See* U.S. CONST. art. I, § 2.

253 Fredrik Bynander & Paul 't Hart, *The Politics of Party Leader Survival and Succession: Australia in Comparative Perspective*, 42 AUSTL. J. POL. SCI. 47, 53–54 (2007). This source discusses the Australian Prime Minister. The structure of the Prime Minister vis-à-vis Parliament is highly analogous to the relationship between the Speaker and the House, and therefore valuable for comparison.

254 Nathaniel Rakich, *Brett Kavanaugh Is Polling Like Robert Bork and Harriet Miers*, FIVETHIRTYEIGHT (July 18, 2018, 1:15 PM), https://fivethirtyeight.com/features/brett-kavanaugh-is-polling-like-robert-bork-and-harriet-miers/ [perma.cc/Q6AC-FZ86] (reviewing polling from Fox News, Gallup, and Pew Research Center).

255 Janie Velencia & Perry Bacon Jr., *Kavanaugh May Be Getting More Unpopular*, FIVETHIRTYEIGHT (Sept. 21, 2018, 5:46 PM), https://fivethirtyeight.com/features/kavanaugh-may-be-getting-more-unpopular/ [https://perma.cc/K2HD-4UZX] (This Note does not take a position on the allegations, and only notes the effect on polling.); *see also* Nate Silver, *The GOP's Least-Worst Option Is if Kavanaugh Withdraws—And Soon*, FIVETHIRTYEIGHT (Sept. 25, 2018, 6:36 AM), https://fivethirtyeight.com/features/the-gops-least-worst-option-is-if-kavanaugh-withdraws-and-soon/ [https://perma.cc/Q5BH-N8T4] ("No one this unpopular has ever been confirmed to the Supreme Court; the only previous nominees who polled as poorly as Kavanaugh either had their names withdrawn (Harriet Miers) or lost their confirmation vote (Robert Bork).").

cans were adversely impacted by this choice in nominee,[256] losing forty seats and the majority in the midterm.[257] It is impossible to know whether or not then-Speaker Ryan would have nominated someone different.[258] Perhaps he would have believed that the Kavanaugh confirmation was worth gambling his authority—or perhaps he would have chosen a less risky conservative nominee. In either case, the choice would be the Speaker's, and not left to a President not up for election.

2. Democratic Representation

The President is not, and has never been, "directly accountable to the people through regular elections."[259] Rather, states choose "a Number of Electors, equal to the whole number of Senators and Representatives" of that state in Congress.[260] This is not mere semantics. A majority of delegates at the Convention opposed making the Senate the sole seat of judicial appointments after the Framers decided that the Senate would represent states rather than people.[261] Madison stated that if "the [Senate] alone should have this power, the Judges might be appointed by a minority of the people . . . which could not be justified on any principle."[262] Washington similarly wrote, "if injudicious or unpopular measures should be taken by the Executive under the new Government with regard to appointments, the Government itself would be in the utmost danger of being utterly subverted by those measures."[263]

It is problematic, then, that the Presidency has reflected antidemocratic principles. Five times in U.S. history an individual has

256 *See* Nate Silver, *Why the House and Senate Are Moving in Opposite Directions*, FiveThirtyEight (Oct. 14, 2018, 9:20 AM), https://fivethirtyeight.com/features/why-the-house-and-senate-are-moving-in-opposite-directions/ [https://perma.cc/QX8T-MQMQ].

257 *U.S. House Election Results 2018*, Politico, https://www.politico.com/election-results/2018/house/ [https://perma.cc/A2NX-RDFK].

258 There is strong evidence, however, that the Republican leaders would not have nominated Kavanaugh precisely because they thought his nomination would be a political issue. *See* Maggie Haberman & Jonathan Martin, *McConnell Tries to Nudge Trump Toward Two Supreme Court Options*, N.Y. Times (July 7, 2018), https://www.nytimes.com/2018/07/07/us/politics/trump-mcconnell-supreme-court.html [https://perma.cc/9CUT-NV2D].

259 Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020).

260 U.S. Const. art. II, § 1.

261 *See supra* Section II.A.

262 Madison, *supra* note 38, at 344.

263 *Letter from George Washington to Samuel Vaughan, March 21, 1789*, Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Washington/05-01-02-0325 [https://perma.cc/J9RM-C4HX]; *see also* The Writings of George Washington 480 (Jared Sparks ed., 1835).

lost the popular vote and won the electoral college.[264] Four of those elections occurred when the parties were highly sorted, and neither party had a commanding political advantage.[265] This outcome might be acceptable if this resulted in divided government, and merely frustrated majoritarian will. But when the electoral college selects the popular vote loser, it almost always has given that individual a majority in the Senate.[266] Thus, at times of great political tension, the power of appointment risks being wholly vested in minoritarian government.

While a justification for the Electoral College is to protect states, the Speaker better reflects geographic diversity. Members of the House have a substantial impact on the Speaker's decision making.[267] This is particularly true where members know what they are voting for, and where they can estimate the impact of their votes.[268] Presidents have little or no electoral incentive to assist states that would never vote for them.[269] Although Presidents do not have to disregard opposing states, they are unlikely to face electoral consequences.[270] Contrast this with the House, where thirteen Democrats represent Texas[271] and eleven Republicans represent California, including the

264 Those moments include John Q. Adams in 1824, Rutherford B. Hayes in 1876, Benjamin Harris in 1888, George W. Bush in 2000, and Donald Trump in 2016. Dave Roos, *5 Presidents Who Lost the Popular Vote But Won the Election*, HISTORY (Nov. 2, 2020), https://www.history.com/news/presidents-electoral-college-popular-vote [https://perma.cc/8C8G-QN7E].

265 FIORINA, *supra* note 138, at 3–18. For example, only twenty-two years before 1900 did the United States have divided control of government. *See supra* Section II.B. Most of those twenty-two years occurred during a highly sorted period after the Civil War. *See supra* Section II.B.

266 Hayes's party had forty of seventy-six seats. Harrison's party had fifty-one of eighty-eight seats. Bush's party had fifty of 100 seats (with Vice-President Cheney able to break ties). Trump's party had fifty-one of 100 seats. *See Party Division*, *supra* note 85. This result makes sense. The electoral college rebalances political strength away from the popular will, and towards state preference. Thus, whenever the electoral college selects popular vote losers, it is apt to empower them with the Senate. *See* U.S. CONST. art I, § 1; *id.* art II, § 1.

267 *See supra* Section III.B.1.

268 *See* Frances E. Lee, *Geographic Politics in the U.S. House of Representatives: Coalition Building and Distribution of Bene?ts*, 47 AM. J. POL. SCI. 714, 714–21 (2003) (comparing the effect of House members on the distribution of funds through earmarks versus state grants).

269 *See* Costas Panagopoulos, *Campaign Dynamics in Battleground and Nonbattleground States*, 73 PUB. OP. Q. 119, 119 (2009).

270 Donald Trump received 32.8% of the vote in Massachusetts in 2016. Despite falling even further in 2020, he faced no electoral consequence. *Massachusetts Presidential Results*, POLITICO (Jan. 6, 2021, 4:41 PM), https://www.politico.com/2020-election/results/massachusetts/ [https://perma.cc/8747-HMMG]; *Massachusetts Results*, N.Y. Times (Aug. 1, 2017, 11:22 AM) https://www.nytimes.com/elections/2016/results/massachusetts [https://perma.cc/4RPN-7HNR].

271 *Texas 2020 House Election Results*, POLITICO (Jan. 6, 2021, 4:41 PM), https://www.politico.com/2020-election/results/texas/house/ [https://perma.cc/K5PX-C7LA].

Minority leader Kevin McCarthy.[272] Because uncompetitive states often have districts represented by both parties, the party and its leadership are still held accountable to those states.[273]

C. Addressing Separation of Powers Concerns

Vesting the Speaker with the nomination power does not pose a threat to the separation of powers. The Senate would still "be an excellent check upon a spirit of favoritism," and would "prevent the appointment of unfit characters."[274] Senators often rely on the President for their reelection prospects,[275] and the President has a unique ability to speak to the nation and shape viewpoints and debates.[276] Because of the different modes of election between the House and the Senate, the Speaker's and Senate's incentives will often conflict when voting margins are thin.[277] Nor can the Speaker overcome Article III protections. She does not direct the executive branch and lacks the ability to influence which cases come before the court.[278] In contrast to Presidents, the Speaker lacks the single-minded focus on protecting her institutional power.[279] Indeed, she, along with members of Congress, have often been willing to delegate vast authority to the President, rather than attempt to horde all power for themselves.[280]

Even if the Speaker threatened Presidential powers, the President has sufficient power to defend his office. Constitutional doctrine advantages him when Congress is too slow or divided to act.[281] He can negotiate by refusing to issue orders or directing agencies to operate contrary to the preferences of Congress.[282] If Congress remains in-

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272 *California 2020 House Election Results*, POLITICO (Jan. 6, 2021, 4:41 PM), https://www.politico.com/2020-election/results/california/house/ [https://perma.cc/A2NX-RDFK].

273 *See House Forecast*, FIVETHIRTYEIGHT, https://projects.fivethirtyeight.com/2020-election-forecast/house/ [https://perma.cc/8SV9-952X] (placing eighty-four House seats in districts that are not "Solid D" or "Solid R" across thirty-nine states).

274 THE FEDERALIST NO. 76, *supra* note 72, at 385 (Alexander Hamilton).

275 Hendriks, *supra* note 179, at 152–80.

276 *See* Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 73–75 (2017).

277 *See, e.g.*, Silver, *supra* note 256.

278 *See* U.S. CONST. art. II, §§ 1, 2.

279 *See* Swaine, *supra* note 180, at 301; *see, e.g.*, 8 U.S.C. § 1182(f) (giving the President, whenever he finds necessary, the power to "suspend the entry of all [foreign nationals] or any class of [foreign nationals]," into the United States or establish "restrictions he may deem to be appropriate").

280 *See* Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 190–211 (2011).

281 See discussion of the *Youngstown* framework, *supra* Section III.B.2.

282 *See* Christina M. Kinana, *Control Without Confirmation: The Politics of Vacancies in*

calcitrant, he can threaten to veto legislation until the Speaker cooperates.[283] The President is particularly advantaged in this regard. Each House member will selfishly want to cooperate with the President to implement their preferred policies.[284] A Speaker will therefore have difficulty bucking the President unless a majority of the House is united in asserting themselves, even at the cost of legislative priorities.[285]

Conclusion

When the Constitution was written, the President was given the judicial nomination power to act as a check on the legislature. This dynamic has flipped. The President has the upper hand in his dealings with the other political branch The unity of his office, his power over the federal bureaucracy, and his political influence make the potential for Presidential havoc on the judiciary too great. The Speaker offers all the advantages of the President without the same potential for harm. The Constitution should be amended to reflect this fact.

Presidential Appointments, 115 Am. Pol. Sci. Rev. 559, 559 (2021); Adam J. White, *Executive Orders as Lawful Limits on Agency Policymaking Discretion*, 93 Notre Dame L. Rev. 1569, 1570–87 (2018).

283 *See* U.S. Const. art. I, § 7.

284 *See* Hendriks, *supra* note 179, at 5.

285 *See id.*